IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Crl.Misc. No.76648-M of 2006
Date of Decision:- 12.1.2007

Satbir Singh ....Petitioner(s)

through
Mr.N.C.Kinra, Advocate

vs.

C.B.I. ....Respondent(s)

through
Mr.Rajan Gupta, Advocate for C.B.I.

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CORAM:-HON'BLE MR.JUSTICE SURYA KANT.

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SURYA KANT, J.

Prayer in this petition under Section 482 Cr.P.C. is to quash the order dated 4.11.2006 passed by the learned Special CBI Judge at Ambala whereby he has not allowed the petitioner to cross-examine prosecution witness, namely, Surinder Kumar.

The petitioner is facing trial in F.I.R.No.RC 2(S)/2001/SIV-I, dated 19.2.2001 under Section 302 IPC read with Section 27 of the Arms Act registered at Police Station, CBI Delhi. The prosecution produced one Surinder Kumar as PW-16 on 29.4.2004. In his deposition, the witness did not support the prosecution case. The petitioner, therefore, did not cross-examine the said witness though an opportunity to this effect was given to him.

Upon an application moved under Section 311 Cr.P.C. by the C.B.I., the learned trial Judge recalled three witnesses for their cross-examination including PW-16 Surinder Kumar. PW-16 Surinder Kumar was re-called for cross-examination as he had been declared as hostile

witness, though it is argued on behalf of the CBI that the said witness was recalled for the reason that the entire statement made by him under Section 161 Cr.P.C. could not be put up to him when he had earlier appeared.

Be that as it may, there is no denial to the fact that the said witness, namely, Surinder Kumar did appear for his cross-examination on 4.11.2006 and has been cross-examined at length by the Special Public Prosecutor for C.B.I. as is apparent from his statement Annexure P-5. After the cross-examination by Special Public Prosecutor for the C.B.I., the defence counsel representing the petitioner made a request to allow him to cross-examine the said witness. His request, however, has been turned down by the learned Special Judge on the ground that since the petitioner had earlier not availed the opportunity of cross-examination of the said witness on 29.4.2004, he cannot now be permitted to do so in view of provisions contained in Sections 137 and 138 of the Indian Evidence Act.

Section 137 of the Indian Evidence Act defines examination-in-Chief and cross-examination of a witness. The party who calls him as witness is defined as examination-in-chief whereas his examination by the adverse party is defined as the cross-examination. The expression "re-examination" has also been defined to mean that if subsequent to the cross-examination a party calls a witness, it shall be called as his "re-examination".

Section 138 defines the order of priority of his examination. A witness was firstly to be examined in chief, then to be cross-examined by the adverse parties, if so desired, followed by his re-examination.

In the present case, the witness has been recalled on an application by the prosecution.

At this stage, it will be apposite to refer to the application dated 27.8.2006 moved by the C.B.I under Section 311 Cr.P.C. whereby it sought recalling of the three witnesses with permission to cross-examine them. It is categorically mentioned in the application that when these witnesses appeared, they did not support the prosecution case. However, inadvertently, certain crucial steps of investigation could not be put to these witnesses during cross-examination, therefore, a necessity to recall them for further cross-examination arose.

As the witness in question turned hostile and did not depose anything against the petitioner in his examination-in-chief which was recorded initially no occasion arose for the petitioner to cross-examination him. However, if the said witness has been recalled and has been re-examined at the instance of the CBI, the petitioner's right as provided under Section 137 of the Evidence Act to cross-examine him cannot be said to have been waived off by him merely because at the initial stage he did not cross-examine him.

There is nothing which can be read into Section 137 or 138 of the Act which prohibits cross-examination of the said witness by the petitioner especially when the principles of fair play would undoubtedly entitle him to cross-examine the said witness.

Consequently and for the reasons aforestated, this petition is allowed; the learned Special Judge is directed to recall PW-16 Surinder Kumar and to allow the petitioner to cross-examine him. However, in this regard, only one opportunity shall be granted. It shall, however, be open to the CBI to move an application before the learned Special Judge to summon the above-named witness for the petitioner's cross-examination on a date

prior to the date already fixed in the trial so that no further delay is caused in conclusion of the trial.

Let a copy of this order be given Dasti on payment of usual charges.

January 12, 2007 **(SURYA KANT)**
poonam **JUDGE**